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OCT 23 1982
ALEXANDER L. STEVAS,
CLERK

82-730

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

ALEXANDER F. EAGLE,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

and

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
a corporation,
Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED.

Is a court of appeals required to use its power to order a district court to remand to a state court, for lack of jurisdiction, a proposed class action brought by one minority shareholder, based on state law, against the majority shareholder of a corporation for breach of fiduciary duty, where the damages suffered by most class members is less than $10,000 each and the district court, after removal of the action as a diversity of citizenship case, has refused to remand?

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No.

IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1982

ALEXANDER F. EAGLE,

PETITIONER,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,

RESPONDENT,

and

AMERICAN TELEPHONE & TELEGRAPH COMPANY, a corporation

REAL PARTY IN INTEREST.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit entered in the above case on August 26, 1982, denying a petition for a writ of mandamus.

OPINIONS BELOW.

The order of the Ninth Circuit Court of Appeals is unreported and is printed in Appendix B hereof, infra, page 4. The orders of the District Court for the Northern District of California are unreported and are printed in Appendix B, pages 1, 2 and 3.

JURISDICTION.

The order of the Circuit Court of Appeals was entered on August 26, 1982. The jurisdiction of this court is invoked under 28 U.S. Code §1254(1).

QUESTION PRESENTED.

Is a court of appeals required to use its power to order a district court to remand to a state court, for lack of jurisdiction, a proposed class action brought by one minority shareholder, based on state law, against the majority shareholder of a corporation for breach of fiduciary duty, where the damages suffered by most class members is less than $10,000 each and the district court, after removal of the action as a diversity of citizenship case, has refused to remand?

STATUTES INVOLVED.

The statutory provisions involved are 28 U.S. Code §1332, §1441(a), §1447(c), and §1651.

STATEMENT OF THE CASE.

Petitioner's complaint for damages as a minority shareholder against Real Party in Interest (hereafter

American) as majority shareholder (owning over 90%) of the common shares of Pacific Telephone and Telegraph Company was filed in a California Superior Court on September 11, 1981. In the complaint Petitioner alleged that American elected all the directors of Pacific and, through them, all of Pacific's officers and made all of Pacific's policy decisions. Among those decisions was the deliberate choice of Pacific not to claim federal income tax deductions for accelerated depreciation and investment tax credits. The choice was made for the benefit of American, not Pacific, and injured the minority shareholders, because the California Public Utilities Commission by a final order on February 13, 1980, required Pacific to refund to its subscribers the sum of $381,000,000 plus interest, thus reducing the amounts otherwise available

to pay dividends to Petitioner and the other shareholders or to enhance the net worth or underlying value of their shares. The complaint contained the usual class action allegations, but the class has not yet been certified.

On or about October 13, 1981, American filed its petition for removal of the action to the District Court and answered the complaint, denying that a class action was properly brought and denying the allegations of wrongdoing, but admitting that it elected the directors of Pacific and that the California Public Utilities Commission had issued the refund order. Other defenses such as the statute of limitations, laches, lack of standing to sue and failure to state a claim were also alleged.

Petitioner moved to remand the action to the State court on the ground

that jurisdiction of the District Court could be based only on 28 U.S. Code §1332 as a diversity of citizenship action, and that in such an action the claim of each and every individual member of the class must exceed $10,000, a requirement not met even as to Petitioner himself (or even Petitioner or his wife for their shares held in community property). In a supporting affidavit Petitioner showed that 90% of the intended class members had claims of less than $2,000 each.

The District Court issued its order denying the motion to remand on November 20, 1981. Thereafter Petitioner filed an amended complaint essentially the same as the first complaint, but adding the allegation that on or about October 26, 1981, American had offered to purchase the shares of Pacific owned by Petitioner and the members of the class, that

American, through a wholly-owned subsidiary, had filed an application with the California PUC for a merger, that the relief sought was not available through the PUC proceedings, and the wrong could be remedied only through the pending action. American filed an answer substantially the same as its answer to the original complaint. It admitted an offer to buy the shares in Pacific owned by the minority shareholders and the PUC application. The other defenses pleaded were substantially the same.

On January 25, 1982, Petitioner's second motion for a remand was denied on the ground that the jurisdiction was determined with reference to the pleadings as they stood at the time of the petition for removal and that a subsequent amendment could have no affect on jurisdiction.

Petitioner moved for orders to rescind, annul or withdraw the order of denial of remand and issuance of an amended order permitting an immediate appeal under 28 U.S.C. §1292(b) so that the question of jurisdiction could be resolved before the time, expense and effort of a costly trial (and probable appeal) were undertaken. On February 12, 1982, the District Court denied the motion to amend its prior order and the motion for an order permitting an appeal.

On April 14, 1982, Petitioner filed with the Ninth Circuit Court of Appeals a petition for a writ of mandamus to compel the District Court to remand the action to the State Court. On May 17 the Ninth Circuit Court of Appeals issued its order requiring that an answer to the petition be filed by American, followed by American's brief and a reply by

Petitioner.

On August 26, 1982, the Court of Appeals issued its order denying the petition for a writ of mandamus "under compulsion of Ex parte Harding, 219 U.S. 363 (1911)." The court said that the denial was without prejudice for motion for reconsideration of the order denying remand in the light of Goldberg v. CPC Financial, Inc. (CA9 1982) 678 F.2d 1365. No motion for reconsideration was made because of the statement of the District Court at a status conference that the motion would be denied because in the opinion of the Court there was only a single cause of action for Petitioner and all of the other members of the class.

The Goldberg case is the subject of a pending petition for a writ of certiori. It would be appropriate to consider this case and the Goldberg

decision together.

REASONS FOR GRANTING THE WRIT.

1. Where a district court lacks original jurisdiction, but refuses to remand after removal from a state court, a court of appeals is not compelled by Ex parte Harding to deny a writ of mandamus requiring the district court to remand.

The Circuit Court stated that the petition for writ of mandamus in this matter was denied because "under compulsion of Ex Parte Harding 219 U.S. 363 (1911), we have no authority to issue the writ in these circumstances."

Such a rigid application of Harding conflicts with 28 U.S. Code §1651, with Appellate Rule 21 and with a substantial body of case law including decisions of the Ninth Circuit itself. The All Writs Statute, 28 U.S.C. §1651(a), provides: "The Supreme Court and all

courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages of principles of law." An important purpose of that statute, is to allow review of a nonappealable order, a category which includes the denial of a remand.

Appellate Rule 21(a) provides: "Application for a writ of mandamus of a prohibition directed to a judge or judges shall be made by filing a petition therefor with the Clerk of the Court of Appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court." If a circuit court has no power to grant mandamus, there is no reason for this rule.

The circuit courts of appeals, being courts established by Act of

Congress, have the statutory authority to grant writs of mandamus under 28 U.S.C. §1651. Therefore, if the Ninth Circuit Court of Appeals thought it lacked authority under any circumstances, it was obviously wrong. However, its order was a conditional denial. It said it had no authority to issue the writ "in these circumstances." Hence, the circumstances to which Harding applies must be definitively stated because the narrow interpretation assumed by the Ninth Circuit, viz., a total lack of power to issue a writ of mandamus to compel a remand even though there is no federal diversity jurisdiction, is contrary to the principal authorities and to Harding itself.

The circumstances which, under the All Writs Statute and more recent decisions than Harding, determine the

matter, namely, the absence of original jurisdiction and the egregious waste of compelling the Petitioner to undertake a lenthy and costly trial and appeal proceeding in order to get a final ruling or jurisdiction, are present. Those circumstances have allowed other courts of appeals to exercise the authority which the Ninth Circuit says it does not have.

The particular circumstances which the Circuit Court felt compelled it to deny its power were not explicated, but, since the issue is jurisdiction, it had to revise Harding in contradiction to the current law to reach its result. It must be brought into line with more recent cases and the limitations of diversity jurisdiction. Harding, as interpreted in this case, is inconsistent with many cases which allowed mandamus in aid of jurisdiction or preservation of its

mistaken use.

If a court of appeals can use mandamus to aid jurisdiction, it has the power to prevent the usurpation of jurisdiction which does not lawfully exist. It follows that, where the District Court in this case erroneously denied a motion for remand and improvidently denied permission for a interlocutory appeal, the case falls within the scope of the "exceptional circumstance" of lack of jurisdiction requiring mandamus.

The Court of Appeals has interpreted Harding to mean something different, from such cases as Will v. United States (1967) 389 U.S. 90. It was there held that the traditional use of mandamus has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction, citing Roche v.

Evaporated Milk Association (1943) 319 U.S. 21. Then it was said that the exceptional circumstances permitting the invocation of the extraordinary writ consist of a judicial usurpation of power, citing De Beers Consolidated Mines, Ltd. v. U.S. (1945) 325 U.S. 212.

In addition to its uses to prevent the exercise of nonexistent jurisdiction and to compel the use existing jurisdiction, mandamus is an instrument to promote economical and orderly administration of justice, a supervisory function of the appellate court, recognized in La Buy v. Howes Leather Co. (1957) 352 U.S. 249, 259-260, in Schlagenhauf v. Holder (1964) 379 U.S. 104, and in Will, supra, The courts of appeals have a power corresponding to the power of the Supreme Court to determine immediately questions relating to the

orderly, even and efficient administration of the judicial system. Mandamus is the method of avoiding the absurd consequence of American Fire & Casualty Co v. Finn (1951) 341 U.S. 6. That case had been improperly removed by a district court having no original jurisdiction. The case was tried to judgment. Then the defendant who had removed the case challenged the final judgment on the ground of lack of jurisdiction. Such an incredibly wasteful imposition on the judicial system and gross unfairness to the plaintiff could occur in this case by allowing the most powerful corporation in the nation to grind small stockholders through needless, costly and lengthy proceedings, only to face a jurisdictional challenge at what should be the end of the case. The only way to avoid such injustice is to liberate the Court of Appeals from its mistaken

interpretation of Harding and to declare that it has the duty to exercise its authority to grant mandamus.

A proper method of resolving the issue would have been an interlocutory appeal under 28 USC §1292(b). Petitioner attempted it, but was denied permission by the District Court. That but was denied the privilege. That fact is significant because several courts have suggested that §1292(b) certification should be sought before resort is had to mandamus.

An inexorable rule that only final jdugments are appealable can work injustices and increase the caseload burden of the federal system unnecessarily, while members of the judiciary are crying out for relief. Such rigidity interferes with the "proper judicial administration in the federal system." (La Buy v. Howes Leather Co.,

supra. That is why extraordinary writs have historically been essential to the federal judicial system, even where there is jurisdiction.

The reconciliation of the use of mandamus for immediate review with the policy against piecemeal appeals was boiled down to the question of exceptional circumstances in the concurring opinion in Will v. United States 389 U.S. at 108:

> "I . . . realize that sometimes the granting of mandamus may bring about the review of a case as would an appeal. Yet this does not deprive a court of its power to issue the writ . . . [T]he issuance of the writ of mandamus is proper where a court finds exceptional circumstances to support such an order."

Whether it be the prevention of the usurpation of judisdiction by the

District Court or the wastefulness of deferring a determination of jurisdiction, the proper and efficient administration of the judicial system requires that the exceptional circumstances for the issuance of a writ of mandamus be explicated and the error of the Court of Appeals in denying its own power by a mistaken interpretation of Harding be corrected.

2. There is no diversity jurisdiction unless plaintiff and every other class member has a claim in the jurisdictional amount, without aggregation.

At this time Petitioner is the only party seeking relief, no class certification having been requested. Under Rule 23 of the Federal Rules of Civil Procedure a class certification may be sought, but the character of the rights of the class members determines whether

the requirements of diversity jurisdiction are met. "Character of the rights" is not the same as "common issues of law and fact" which govern class actions. In the absence of a single, indivisible right, which can be sued on only once, the members of the class cannot aggregate their claims to satisfy the jurisdictional amount. That was decided in Snyder v. Harris (1969) 394 U.S. 332. If they cannot aggregate, each claim must meet the minimum jurisdictional amount.

Since aggregation is not permitted, the question is whether there is only one claim, making aggregation necessary. That depends on its jural nature. Petitioner's claim herein is based on California law, particularly Jones v. H.F. Ahmanson & Co. (1969) 1 C.3d 93. At pages 106-7, the California Supreme Court distinguished carefully

between a derivative action brought on behalf of a corporation for the benefit of shareholders and the personal action of a shareholder brought for his own benefit. The latter action need not be unique and may be similar to or affect the rights of other shareholders, but it is not brought for them or for the benefit of the corporation. In Ahmanson the plaintiff sought damages (and other relief) for losses suffered as a minority shareholder because of breaches of fiduciary responsibilities by the defendants, who were the majority shareholders. The court recognized that an action lay for the damage suffered by the minority shareholders directly, saying, at 107:

> "It is clear from the stipulated facts and plaintiff's allegations that she does not seek to recover on behalf of the corporation for injury done to the

corporation by defendants. Although she does allege that the value of her stock has been diminished by defendants' actions, she does not contend that the diminished value reflects an injury to the corporation and resultant depreciation in the value of the stock. Thus the gravamen of her cause of action is injury to herself and the other minority shareholders.

"* * *The individual wrong necessary to support an action by a shareholder need not be unique to that plaintiff. The same injury may affect a substantial number of shareholders. If the injury is not incidental to an injury to the corporation, an individual cause of action exists." (Emphasis supplied)

The manner in which the damages of individual shareholders will be measured is not the test of the nature of the right. Potential dividends do not indicate a common or single right which would satisfy the jurisdictional amount on a collective basis. Giesecke v. Denver Tramway Corp. (DCDel. 1949) 81 F.Supp. 957. The case was decided under old Rule 23, but the same concept applies under the current rule.

The total detriment or monetary impact on the defendant, even though the judgment produces a fund out of which the class members are distributed shares, does not provide a basis for aggregation of their claims or the coelescence of their claims into a single right. Snow v. Ford Motor Co. (CA9 1977) 561 F.2d 787.

In this case the Petitioner could proceed without seeking certification of

the class or he could proceed even if certification were denied. That circumstance alone, permissible under Ahmanson, action is based, shows that he has an individual cause of action. If he has an individual cause of action, so does every other class member. Therefore, under Snyder, the claims cannot be aggregated and the federal court has no jurisdiction because 90% of the class members do not meet the jurisdictional minimum.

CONCLUSION

The overly simplified headnote of Harding has been literally applied by the Court of Appeals. By doing do, it has overextended Harding, abolished the exception that Harding itself preserved, and brought itself into conflict with other circuits and decisions of its own. Harding specifically reaffirmed the

doctrine of Virginia v. Rives (1880) 100 U.S. 313, 25 L.Ed. 667, which is restated at 219 U.S. 373: '"It [mandamus] does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside the jurisdiction of the court or officer to which or to whom the writ is addressed."' (Emphasis supplied)

In this case the District Court lacked original jurisdiction because Petitioner's claim is less than the amount required for diversity jurisdiction (under 28 U.S.C. §1332), his claim is personal and not a share in a sinngle claim jointly owned by all minority shareholders (under Ahmanson) and his and the other shareholders' claims cannot be aggregated (under Snyder). Since the District Court can exercise jurisdiction over a removed

action only if it would have had jurisdiction had the case been originally brought there by Petitioner (Snow v. Ford Motor Co., supra, 561 F.2d at 789), there is no jurisdiction at this time. Therefore, even under Harding when properly read and applied, due to the lack of jurisdiction the foreseeable needless waste occasioned by deferring the issue until an appeal after judgment, remand should have been granted. The Court of Appeal's disclaimer of authority to grant it has created uncertainty in the law which should be corrected by this Court.

Dated: October 22, 1982.

Respectfully submitted,

William L. Knecht

WILLIAM L. KNECHT

SAMUEL L. HOLMES
(Counsel of Record)
ANGELL, HOLMES & LEA

ATTORNEYS FOR PETITIONER
ALEXANDER F. EAGLE

(Appendices follow)

§1332. Diversity of citizenship; amount in controversy; costs.

(a) The district court shall have original jurisdiction of all civil actions wherethe matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between -

(1) citizens of different States; * * *

1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in na State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and

division embracing the place where such action is pending.

§1447. Procedure after removal generally.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

§1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions

and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

APPENDIX B
(page 1)

United States District Court

for the Northern District of California

ALEXANDER P. EAGLE, individually and on behalf of all others similarly situated, Plaintiff, vs. AMERICAN TELEPHONE & TELEGRAPH COMPANY, a corporation, Defendant.	No. C-81-4078-WWS ORDER DENYING MOTION TO REMAND

Plaintiff's motion to remand came on for hearing on November 20, 1981. The Court, having reviewed the memoranda and supporting exhibits and having heard arguments of counsel, finds that this lawsuit was properly removed and that this Court has jurisdiction; therefore,

IT IS ORDERED that plaintiff's motion to remand is denied.

Dated: 11/20/81.

William W Schwarzer
United States District Judge

ORDER DENYING MOTION TO REMAND

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FILED

JAN 25 1982

WILLIAM L. WHITTAKER
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ALEXANDER F. EAGLE, individually and on behalf of all others similarly situated,

Plaintiff,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

NO. C-81-4078-WWS

ORDER

Federal jurisdiction is determined with reference to the pleadings as they stood at the time of filing of the petition for removal. Pullman Co. v. Jenkins, 305 U.S. 534, 537 (1939). Subsequent amendment of a pleading can have no effect on jurisdiction once it has attached. St. Paul Indemnity Co. v. Cab Co., 303 U.S. 283 (1938). Accordingly the second motion to remand must be denied.

IT IS SO ORDERED.

DATED: January 25, 1982

WILLIAM W SCHWARZER
United States District Judge

ORIGINAL
FILED
FEB 11 1982
WILLIAM L. WHITTAKER
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ALEXANDER F. EAGLE, individually and on behalf of all others similarly situated,

Plaintiff,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, a corporation,

Defendant.

NO. C-81-4073-WWS

ORDER

Good cause appearing, the motion to amend order and for an order permitting an appeal is denied.

The action is set for a status conference on Friday, March 19, 1982, at 9 a.m. The parties should comply with L.R. 235-3 and should be prepared to advise the Court with respect to contemplated further proceedings, and specifically the impact if any of the proposed settlement in United States v. American Telephone & Telegraph Co.

IT IS SO ORDERED.

DATED: February 12, 1982

WILLIAM W SCHWARZER
United States District Judge

APPENDIX B
(page 4)

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALEXANDER F. EAGLE, Petitioner, vs. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, Respondent, and AMERICAN TELEPHONE & TELEGRAPH COMPANY, a corporation, Real Party in Interest.	No. 82-7218 DC# 785006 WWS Northern California ORDER

Before: FLETCHER and NORRIS, Circuit Judges

The petition for writ of mandamus is denied. Under the compulsion of Ex Parte Harding, 219 U.S. 363 (1911), we have no authority to issue the writ in these circumstances. This order is without prejudice to petitioners' right to move the district court for reconsideration of its order in light of Goldberg v. CPC International, Inc., 678 F.2d 1365 (9th Cir. 1982).

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Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

and

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
a corporation,
Real Party in Interest.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Real Party in Interest's Brief In Opposition to Petition for a Writ of Certiorari

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No. 82-730

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALEXANDER F. EAGLE,
Petitioner,

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

and

AMERICAN TELEPHONE & TELEGRAPH COMPANY, a corporation,
Real Party in Interest.[1]

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Real Party in Interest's Brief in Opposition to Petition for a Writ of Certiorari

STATEMENT OF THE CASE

Petitioner, a shareholder of The Pacific Telephone & Telegraph Company ("Pacific"), instituted a class action in California Superior Court against American Telephone and Telegraph Company ("AT&T"), on behalf of a purported class consisting of all Pacific shareholders except

1. The parties are set forth in the title; real party in interest American Telephone & Telegraph Company owns stock in the following publicly owned corporations:
Southern New England Telephone Company
Cincinnati Bell, Inc.

AT&T. The complaint alleged that AT&T, which owned approximately 90 percent of Pacific's voting shares during the time in question,[2] "us[ed] Pacific for [AT&T's] advantage in violation of the rights of all minority shareholders" (Pet.for Mandamus (9 Cir.) Exh. A, ¶ 4) and that AT&T's conduct resulted in an order by the California Public Utilities Commission requiring Pacific to refund $381 million to its customers (Pet.for Mandamus (9 Cir.) Exh. A, ¶ 7).

Petitioner alleged that the minority shareholders' injuries "correspond to the number of shares each owns in Pacific" (Pet.for Mandamus (9 Cir.) Exh. A, ¶ 4), and that "plaintiff and the class members have been damaged in the amount of at least $38,000,000" (Pet.for Mandamus (9 Cir.) Exh. A, ¶ 8)—an amount approximately equal to 10 percent of the $381 million refund in question.[3] No individual damages were alleged or claimed by petitioner in the complaint.

AT&T removed the action to the United States District Court for the Northern District of California, which denied petitioner's motion to remand the case to state court (Cert. Pet., Appx. B, p. 1). Petitioner amended his complaint and again moved for remand; the district court denied this second motion on the ground that "[s]ubsequent amendment of a pleading can have no effect on jurisdiction once it has attached" (Cert.Pet., Appx. B, p. 2). The district court also denied petitioner's motion for permission for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (Cert.Pet., Appx. B, p. 3).

The Court of Appeals for the Ninth Circuit denied a petition for writ of mandamus, relying upon *Ex Parte Harding* (1911) 219 U.S. 363 (Cert.Pet., Appx. B, p. 4).

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2. Pacific is now a wholly owned subsidiary of AT&T.

3. The complaint also sought $20 million punitive damages (Pet. for Mandamus (9 Cir.) Exh. A, ¶ 10).

ARGUMENT

Petitioner's argument to this Court is based on the erroneous assertion that the Court of Appeals misinterpreted *Ex Parte Harding* (1911) 219 U.S. 363 in denying mandamus to review a district court order denying a motion to remand the case to state court. The decision below was entirely consistent with this Court's decisions in *Ex Parte Harding* and subsequent cases: "This Court has consistently refused to sustain the use of mandamus as a means of reviewing the action of a district court in denying a motion to remand a cause to the state court from which it had been removed" (*Roche v. Evaporated Milk Assn.* (1943) 319 U.S. 21, 30).

Contrary to petitioner's assertion, the Court of Appeals did not reach the question whether the jurisdictional amount was satisfied. In any event, the district court properly ruled that this action was removable because petitioner seeks to create a common fund in excess of the jurisdictional amount.

I. THE RULING BELOW—THAT MANDAMUS IS NOT AVAILABLE TO REVIEW A DISTRICT COURT ORDER DENYING A MOTION TO REMAND A CASE TO STATE COURT—IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

It is settled by *Ex Parte Harding* (1911) 219 U.S. 363 and subsequent decisions of this Court that, as the court below held, mandamus is not available to review a district court order denying a motion to remand a case to state court:

> "[In *Harding*] the subject was extensively considered and it was held that the writ of mandamus may not be used to correct alleged error in a refusal to remand where, after final judgment, the order may be reviewed upon a writ of error or an appeal" (*Ex Parte Roe* (1914) 234 U.S. 70, 73).

The crux of petitioner's position, before both this Court and the court below, is the erroneous assertion that the district court order denying remand is "nonappealable" (Cert.Pet., p. 11). But the order denying remand is reviewable on appeal from a final judgment (*American Fire & Cas. Co. v. Finn* (1951) 341 U.S. 6, 18-19)—petitioner will then have an opportunity to challenge the removal jurisdiction of the district court.

There is no basis for petitioner's contention (Cert.Pet., pp. 12-13) that mandamus is justified because seeking review of the district court order on appeal may be inconvenient and expensive:

> "[*Harding*] also makes clear that however grave may be the inconvenience arising in this particular case from the construction which the court gave to the statute and upon which it based its assertion of jurisdiction, greater inconvenience in many other cases would necessarily come from now departing from the established rule" (*Ex Parte Park Sq. Automobile Station* (1917) 244 U.S. 412, 416; accord, *Roche v. Evaporated Milk Assn.* (1943) 319 U.S. 21, 31).

Petitioner also contends that the ruling below is inconsistent with *Will v. United States* (1967) 389 U.S. 90 (Cert. Pet., pp. 14-15, 19). But *Will* explicitly recognized that

> "[c]ourts faced with petitions for the preemptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous" (389 U.S. 98, n. 6).

A fortiori, the court below properly denied review by mandamus of an order reviewable on appeal from a final judgment.

Petitioner's criticism of the holding in *American Fire & Cas. Co. v. Finn* (1951) 341 U.S. 6, that a party removing a case to district court may later challenge a final judgment on the ground of lack of jurisdiction (Cert.Pet., pp. 16-17), misses the point: the Court of Appeals ruled only that *petitioner* could not use mandamus to obtain interlocutory review of the district court's order; nothing in the decision below speaks to the issue of whether *AT&T* would be able to challenge jurisdiction after a final judgment (Cert.Pet., Appx. B, p. 4).

II. THE COURT OF APPEALS DID NOT RULE ON THE ISSUE OF WHETHER THE JURISDICTIONAL AMOUNT WAS SATISFIED. IN ANY EVENT, THE DISTRICT COURT PROPERLY RULED THAT THIS ACTION WAS REMOVABLE.

Petitioner erroneously asserts that this case presents a question as to whether "the District Court lacked original jurisdiction because Petitioner's claim is less than the amount required" (Cert.Pet., p. 25). The decision below did not reach the issue of whether the amount in controversy was satisfied (Cert.Pet., Appx. B, p. 4). Thus, petitioner's argument that certiorari should be granted because the district court lacked jurisdiction (Cert.Pet., pp. 19-24, 25-26) is irrelevant.

In any event, the district court properly rejected petitioner's contention that the jurisdictional amount was not satisfied. Petitioner's complaint sought a fund of $38 million damages for the class, as well as $20 million punitive damages (Pet.for Mandamus (9 Cir.) Exh. A, ¶¶ 8, 10).[4] The complaint did not allege individual damages to petitioner or to any member of the class (Pet.for Mandamus (9 Cir.)

4. Removal jurisdiction is determined "according to the plaintiffs' pleading at the time of the petition for removal" (*Pullman Co. v. Jenkins* (1939) 305 U.S. 534, 537).

Exh. A, ¶ 4). Where, as here, plaintiffs jointly seek recovery of a single fund, "it is enough if their interests collectively equal the jurisdictional amount" (*Troy Bank v. Whitehead & Co.* (1911) 222 U.S. 39, 41; *Snyder v. Harris* (1969) 394 U.S. 332, 335).[5]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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5. The complaint alleged that the damages to the minority shareholders resulted from depletion of the assets of Pacific and an accompanying loss of dividends (Pet.for Mandamus (9 Cir.) Exh. A, ¶ 7). Under California law, the shareholders' interest in both dividends and assets of a company is a common and undivided interest (*Oilwell etc. Co. v. Petroleum etc. Co.* (1944) 64 Cal.App.2d 367; *Atkins v. Gamble* (1871) 42 Cal. 86, 99).

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No. 82-730

IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1982,

ALEXANDER F. EAGLE,

Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Respondent,

and

AMERICAN TELEPHONE & TELEGRAPH COMPANY, a corporation,

Real Party in Interest.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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With increasing frequency the Chief Justice of the United States expresses concern for the ability of the Federal system to handle its excessive caseload. In the face of that concern, increasing the caseload by retention of a case over which there is no original jurisdiction, by reason of a simplistic and mechanical application of an erroneous interpretation of ex parte Harding (1911) 219 U.S. 363, must be prevented. Harding does not mean that mandamus is beyond the power of the Circuit Court of Appeals. That Court has authority to issue mandamus to compel an inferior court to relinquish jurisdiction of a removed case which is not within its lawful original jurisdiction. Using mandamus for that purpose would accomplish to some degree the relief which the Chief Justice continually argues is necessary.

I. MANDAMUS IS AVAILABLE TO A CIRCUIT COURT WHEN JURISDICTION IS IMPROPERLY ASSUMED BY A DISTRICT COURT.

Harding holds that mandamus may be issued in special circumstances, viz., where an inferior court lacks jurisdiction. Harding recognized such circumstances had been and continued to be a proper basis for mandamus in Virginia v. Rives (1880) 100 U.S. 313 and the line of cases following it, in which mandamus had been issued to prevent the improper assertion of jurisdiction. The essential meaning of Harding is that mandamus can be used to control the usurpation of jurisdiction, but cannot be used to control discretion of a lower court.

That distinction was preserved in Roche v. Evaporated Milk Association (1943) 319 U.S. 21. The quotation in the opposition brief is out of context. The Harding exceptions are still the law. Roche

approved the use of mandamus in at least two special circumstances (page 32). One of these situations squarely fits this case:

> "It [mandamus] was issued in aid of the appellate jurisdiction of this Court to compel an inferior court to relinquish a jurisdiction which it could not lawfully exercise . . . "

This is such a case, but the Circuit Court has denied its own power to act.

II. THE DISTRICT COURT DISREGARDED SYNDER v. HARRIS TO USURP JURISDICTION.

The amounts in controversy for individual members of a class cannot be aggregated to satisfy the requirement of 28 U.S.C. §1332(a). Snyder v. Harris (1969) 394 U.S. 332.

Plaintiff's claim for less than $10,000 arises under California law, which is that each minority shareholder has an

action against a wrongdoing majority shareholder for breach of fiduciary duties. Jones v. H. F. Ahmanson & Co. (1969) 1 C.3d 93. How the damages may ultimately be measured does not determine the jural nature and the individuality of the cause of action.

CONCLUSION.

The District Court had no original jurisdiction of this case. It was improvidently removed. The need for preservation of the limitation on Federal jurisdiction in this situation presents the special circumstances for exercise of the power of mandamus which the Ninth Circuit Court of appeals has erroneously ruled it does not have. Therefore, the petition for certiorari should be issued.

Dated: November 19, 1982.

Respectfully submitted,

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CERTIFICATE OF SERVICE

SAMUEL L. HOLMES certifies as follows:

On November 19, 1982, PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI in the above-entitled case was mailed to the parties required to be served in envelopes deposited to the

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_____
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